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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

THE STATE OF MISSOURI at the relation of JOHN J. CARROLL, *Petitioner*,

vs.

CHARLES U. BECKER, Secretary of State of the State of Missouri, *Respondent*.

No. 805

STATEMENT OF THE CASE AND BRIEF OF RESPONDENT.

STRATTON SHARTEL,
Attorney-General,
RAY WEIGHTMAN,
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IN THE

Supreme Court of Missouri

OCTOBER TERM, 1931.

EN BANC.

THE STATE OF MISSOURI at the relation of JOHN J. CARROLL, *Relator*, vs. HON. CHARLES U. BECKER, Secretary of State of the State of Missouri, *Respondent*.	No. 31668.

STATEMENT OF THE CASE AND BRIEF OF RESPONDENT.

STATEMENT.

Missouri under the 1930 census and the act of Congress of June 18, 1929, became and is entitled to elect thirteen representatives in the Congress of the United States at the general election to be held in 1932.

The General Assembly of Missouri at its session in 1931 by a majority vote of the Senate and House of Representatives, acting separately, passed a bill

dividing the State into thirteen numbered districts, which was sent to the Governor April 24, 1931, and was on the 25th day of April, 1931, vetoed by him and returned to the Senate in which it originated, with his objections thereto in writing; and the disapproval of the bill and objections of the Governor were on that day entered on the Senate Journal. No other or further action was taken on the bill by the General Assembly.

The relator on October 26, 1931, tendered for filing in the office of the Secretary of State his declaration as a candidate for nomination by the Democratic Party at the primary election to be held on the first Tuesday in August, 1932, for Representative in the Congress of the United States from what was numbered and described in said bill as the tenth district. The respondent refused to accept and file relator's declaration as such candidate, and the relator applied to the Supreme Court for a writ of mandamus to compel the respondent to file the declaration. An alternative writ of mandamus was issued by the court on an amended petition filed by the relator, to which the respondent made return, setting out in detail his reasons for refusing to file the declaration, all of which may be summed up in the statement that such refusal was on the ground that there was no such district in existence.

It is conceded for the purpose of this action that the declaration was in proper form; that the relator possessed the necessary qualifications; and that he

was and is entitled to file such declaration if there be such a district.

While the Congress of the United States has the sole and exclusive power to pass upon the election and qualification of its members, this court has jurisdiction to determine whether or not the General Assembly of Missouri has acted within its power and in accordance with the provisions of the Constitution of this State and the laws of Congress and Constitution of the United States, and the effect of its action.

If there is a tenth district from which a representative in the Congress of the United States is to be elected in 1932, the writ applied for should be granted. If no such district was created and established by the action of the General Assembly, the writ should be denied.

POINTS AND AUTHORITIES.

We desire to acknowledge our indebtedness to the Attorney-General of New York and his assistants for the exhaustive research made by them and their brief in a similar case, without which we would have been unable to compile this brief in the limited time allotted.

The House of Representatives shall be composed of members chosen every second year by the people of the several states. The number of representatives shall be apportioned among the states according to the number of their inhabitants, the enumeration to be made within three years after the first meeting of Congress of the United States and within every subsequent term of ten years, in such manner as the Congress shall by law direct.

Section 2, Article I, Constitution of the United States.

The times, places and manner of holding election for representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations.

Section 4, Article I, Constitution of the United States.

There is no doubt of the power of Congress over the election of representatives, and when it is exercised, it is exclusive and complete.

Ex parte Siebold, 100 U. S. 371;
United States v. Gradwell, 243 U. S. 476, 481.

The Congress of the United States by the act of June 18, 1929 (46 St. L. 26, Title 2, U. S. C. A. 1931. Cumulative Annual Pocket Part, Sec. 2a, p. 7), provided for the taking of the 1930 census and the apportionment of representatives to the several states.

The Congress by act of August 8, 1911, and particularly Sections 3 and 4 of that act, which are a part of the general law, under the act of Congress of December 7, 1925, Title 1, U. S. C. A., page 3, and which are as follows:

"Sec. 3. Election by districts. In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative. (Aug. 8, 1911, c. 5, Sec. 3, 37 Stat. 14.)

"Sec. 4. Additional Representatives at large. In case of an increase in the number of

Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts prescribed by law on August 8, 1911, until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section 3; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts prescribed by law on August 8, 1911, until such State shall be redistricted as herein prescribed. (Aug. 8, 1911, c. 5, Sec. 4, 37 Stat. 14.)"

37 St. L. 14, Title 2, U. S. C. A., Sections 3 and 4, page 19,

provided for the division of the states into congressional districts in the manner provided by the laws of the State and in accordance with the rules set out in Section 3 that they be composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.

Sections 3 and 4 of the act of Congress of August 8, 1911, have not been repealed and are in full force and effect, the opinion of the Supreme Court of Minnesota in the case of Smiley v. Holm, which is relied upon by the relator, notwithstanding.

Where the existence of a statute is brought in question, the courts may examine the legislative

proceeding to ascertain the facts as to what was actually done, and the intention of the legislative body.

Ruckert v. Grand Avenue Railway Co., 163 Mo. 260, 63 S. W. 814;
State ex rel. v. State Highway Commission, 42 S. W. (2d) 196, l. c. 202.

The Supreme Court of Minnesota overlooked or ignored the proceedings in Congress when the act of June 18, 1929, was under consideration. An examination of the Congressional record establishes the fact that the Congress had no intention of repealing Sections 3 and 4 of the act of August 8, 1911, and that in fact the act of June 18, 1929, was only intended to provide for the taking of the 1930 census and the apportionment of the number of representatives to which each state would be entitled under that census.

Mr. Reed of New York, when the act of June 18, 1929, was pending, offered an amendment relating to the formation of districts.

Congressional Record, Vol. 71, Part 2, p. 2279;
Congressional Record, Vol. 71, Part 3, pp. 2363-4.

The point of order was made against the amendment that it was not germane to the bill. The discussion of the question in the Congress is set out in the Congressional record, Volume 71, part 3, pages 2443 and 2444.

Mr. French of Idaho, speaking to the point of order, said:

> "So, bringing the matter to a head, I submit that the pending bill provides for the repeal of Section 1 of the act of August 8, 1911, as this section is in conflict with definite provisions of the pending bill, but it does not provide for the repeal of sections 2, 3, 4 and 5. If that is true, it seems to me that the amendment of the gentleman from New York is germane."

Thereafter, the effect of the provision in Section 21 of the act of June 18, 1929, which reads as follows:

> "That the act entitled 'An act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed."

was further considered (Congressional record, Vol. 71, part 3, p. 2445) and the chair ruled:

> "The gentleman from New York calls attention to that provision and claims that that relates to certain sections of the act of August 8, 1911, which bore on the subject of redistricting by the States, but it seems to the Chair that the gentleman overlooked the effect of the words —'all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.'

"If there is nothing in this bill relating to redistricting, then there can be nothing in it which is inconsistent with the act of 1911 on that subject. There can be no repeal by this bill of any law or parts of laws which are not inconsistent with that act on the subject of redistricting by state legislatures."

It thus appears conclusive that the Congress by the act of June 18, 1929, had no intention of repealing Sections 3 and 4 of the act of August 8, 1911, and did not repeal them.

If the act of August 8, 1911, was not repealed, then the entire reasoning of the Minnesota court falls.

The applicable and controlling decision of the Supreme Court of the United States is State of Ohio ex rel. Davis v. Hildebrandt, 36 Supreme Court 708, 241 U. S. 565, 60 Law Edition 1172, 114 N. E. 55, 94 Ohio St. 154, which holds that the districts should be established and created by the states in the manner required by the Constitution and laws of the state and that such districts should be created by law, and that such law was subject to the initiative and referendum provision of the Constitution.

For one hundred and forty-two years, from the establishment of this government to the year 1931, the universal opinion of legislators, executives, courts and students of our form of government, was that when the several states were divided into congressional districts, that the proper and neces-

sary procedure was to enact a law in the manner required by the Constitution of the state; and in states where the Governor was vested with a part of the legislative power with the right to veto an act of the legislature, that the law forming such districts, like any other law, was subject to the Governor's veto or approval; and that in states where the Constitution reserved legislative powers to the people by the initiative and referendum, as in Ohio and Missouri, such laws were also subject to the referendum. It is inconceivable that all should have been in error until the year 1931, when certain persons who will be, or think they will be, at the time benefited by a new rule, suddenly discover that the Legislature, using that term in its restricted sense as applying to the members elected to that body, has the sole and exclusive power of dividing the states into congressional districts.

Long-continued interpretation of the Constitution or of laws, followed by unanimous consent, should not be lightly disregarded by the court, but furnish a safe guide as to what was originally intended.

State ex rel. Barrett v. First National Bank, 297 Mo. 397, 249 S. W. 619; affirmed, First National Bank v. State of Missouri, 263 U. S. 648, 68 Law Ed. 486;

Lefman v. Schuler, 317 Mo. 671, 296 S. W. 808;

State ex inf. Majors v. Breuer, 235 Mo. 240, 138 S. W. 515.

The following table of what has been done in regard to the establishment of congressional districts in the states of the Union since the establishment of this government, should establish conclusively that the proper and necessary procedure is that such districts be created and established by statute.

State.	Method.	Remarks.
Alabama	Statute	Question never raised.
Arizona		One representative. Question never raised.
Arkansas	Statute	1901—Act 145 at p. 31, Crawford & Moses' Digest.
California	Statute	Section 117, Political Code. Chap. 181, Statutes of 1931. Question of the applicability of a referendum provision of State Constitution, Sec. 1, Art. 4, on the reapportionment of 1931 raised but petition for referendum failed to obtain proper number of signatures. Attorney-General of California opposed to redistricting by any means other than statute.
Colorado	Statute	Question never raised.
Connecticut	Statute	Question never raised.
Delaware		One representative. Question never raised.
Florida	Statute	Compiled General Laws 1929, Art. 3.
Georgia	Statute	Question never raised.
Idaho	Statute	Question never raised.
Illinois	Statute	Question never raised.
Indiana	Statute	State v. Bailey, 16 Ind. 46; May v. Rice, 91 Ind. 546. Question never raised. 1891 bill passed over Governor's veto. 1895 bill passed over Governor's veto.
Iowa	Statute	Constitutional provision, Art. 3, Sec. 37, against subdividing counties and forming congressional districts and against districts including non-adjoining counties.
Kansas	Statute	Question never raised.

State.	Method.	Remarks.
Kentucky.....	Statute...	Question never raised.
Louisiana.....	Statute...	Question never raised. Act 160, p. 294, Laws of 1912.
Maine.....	Statute...	Question never raised. Public Laws 1931, Chap. 245. Resolution requiring approval of Governor has the effect of law. Difference between resolution and other act is only on the question of number of readings before the Legislature.
Maryland.....	Statute...	Code of Public Laws, 1924, Art. 33, Sec. 163 of 172.
Massachusetts..	Statute...	Laws of 1931, Chap. 438.
Michigan.....	Statute...	Question never raised.
Minnesota.....	Statute... (up to 1931)	Statute vetoed 1931. Legislative act without Governor's approval filed. See discussion herein, Smiley v. Holm —decision of Minnesota Supreme Court, Oct. 9, 1931.
Mississippi....	Statute...	Question never raised.
Missouri.....	Statute...	Constitutional provision for referendum. Attorney-General's opinion opposed to redistricting other than by law, including referendum provision.
Montana.....	Statute...	Question never raised.
Nebraska.....	Statute...	Question never raised.
Nevada.....	.....	One Congressman.
New Hampshire.	Statute...	Question never raised.
New Jersey....	Statute...	Question never raised.
New York.....	Statute... (up to 1931)	Issue before the court herein of Concurrent Resolution of Senate and Assembly of April 10, 1931.
New Mexico....	.....	One Representative.
North Carolina.	Statute...	Question never raised.
North Dakota..	Statute...	Question never raised.
Ohio.....	Statute...	See: Davis v. Hildebrandt, 241 U. S. 565-103 Ohio Laws 567, discussed herein.
Oklahoma.....	Statute...	Question never raised.
Oregon.....	Statute...	Question never raised.
Pennsylvania...	Statute...	Act 361—approved June 27, 1931.
Rhode Island..	Statute...	Question never raised.
South Dakota..	Statute...	See: Schrader v. Polley, 26 S. D. 5.

State.	Method.	Remarks.
Tennessee.....	Statute...	Question of joint resolution authorizing constitutional convention, but not involving districting, now pending.
Texas.....	Statute...	Concurrent resolutions need executive approval, Art. 4, Sec. 15, Constitution of Texas.
Utah.....	Statute...	Constitutional provision for districting, Sec. 1, Art. 9.
Vermont.....	Statute.	Question never raised.
Virginia.....	Statute...	Constitutional provision for districting by law. Section 55, State Constitution.
Washington....	Statute...	Question never raised.
West Virginia...	Statute...	See: Re: Boyd Adkins, 83 W. Va. 673. Joint Resolution not effective as a statute.
Wisconsin.....	Statute...	Legislative Committee appointed to investigate proper procedure. Statute introduced in the Assembly and passed—Bill No. 998-a. Adjournment before further action.
Wyoming.....	.....	One Representative.

The General Assembly of Missouri is not the sole depository of legislative power; a part of such power is vested in the Governor; a part of it has been reserved to the people by the initiative and referendum; and all of the legislative acts of the General Assembly are limited by the Constitution of the State.

Section 1 of Article IV of the Constitution is as follows:

> "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri'."

Section 24 of Article IV of the Constitution is as follows:

> "The style of the laws of this State shall be: '*Be it enacted by the General Assembly of the State of Missouri, as follows:*' "

Section 25 of Article IV of the Constitution is as follows:

> "No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose."

Section 38 of Article IV of the Constitution is as follows:

> "When the bill has been signed, as provided for in the preceding section, it shall be the duty of the Secretary of the Senate, if the bill originated in the Senate, and of the Chief Clerk of the House of Representatives, if the bill originated in the House, to present the same in person, on the same day on which it was signed as aforesaid, to the Governor, and enter the fact upon the journal. Every bill presented to the Governor, and returned within ten days to the House in which the same originated, with the approval of the Governor, shall become a law, unless it be in violation of some provision of this Constitution."

Section 39 of Article IV of the Constitution is as follows:

"Every bill presented as aforesaid, but returned without the approval of the Governor, and with his objections thereto, shall stand as reconsidered in the house to which it is returned. The house shall cause the objections of the Governor to be entered at large upon the journal, and proceed, at its convenience, to consider the question pending, which shall be in this form: 'Shall the bill pass, the objections of the Governor thereto notwithstanding?' The vote upon this question shall be taken by yeas and nays, and the names entered upon the journal, and if two-thirds of all the members elected to the house vote in the affirmative, the presiding officer of that house shall certify that fact on the roll, attesting the same by his signature, and send the bill, with the objections of the Governor, to the other house, in which like proceedings shall be had in relation thereto; and if the bill receive a like majority of the votes of all the members elected to that house, the vote being taken by yeas and nays, the presiding officer thereof shall, in like manner, certify the fact upon the bill. The bill thus certified shall be deposited in the office of the Secretary of State, as an authentic act, and shall become a law in the same manner and with like effect as if it had received the approval of the Governor."

Section 57 of Article IV of the Constitution reserves legislative power to the people by the initiative and referendum.

Section 12 of Article V of the Constitution is as follows:

> "The Governor shall consider all bills and joint resolutions, which, having been passed by both houses of the General Assembly, shall be presented to him. He shall, within ten days after the same shall have been presented to him, return to the house in which they respectively originated, all such bills and joint resolutions, with his approval indorsed thereon, or accompanied by his objections: *Provided*, That if the General Assembly shall finally adjourn within ten days after such presentation, the Governor may, within thirty days thereafter, return such bills and resolutions to the office of the Secretary of State, with his approval or reasons for disapproval."

Section 14 of Article V of the Constitution is as follows:

Even Resolutions must be presented to Gov.

"Every resolution to which the concurrence of the Senate and House of Representatives may be necessary, except on questions of adjournment, of going into joint session, and of amending this Constitution, shall be presented to the Governor, and before the same shall take effect, shall be proceeded upon in the same manner as

in the case of a bill: *Provided*, That no resolution shall have the effect to repeal, extend, alter or amend any law."

The General Assembly of Missouri has no power to enact law by resolution. The only resolutions of the General Assembly that are not subject to the approval or veto of the Governor are expressly stated in Section 14 of Article V of the Constitution.

The legislative authority in this State is not vested solely in the General Assembly. The Governor is a factor in legislation, and reservations are also made to the people.

Nichols v. Robinson, 277 Mo. 483, 211 S. W. 11;
State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S. W. 1017;
State ex rel. Barrett v. Dallmeyer, 295 Mo. 638, 245 S. W. 1066.

Limitations placed on the legislative power by the Constitution are mandatory.

State ex rel. v. Public Service Commission, 270 Mo. 429, 192 S. W. 958;
State ex rel. v. Public Service Commission, 301 Mo. 179, 257 S. W. 462.

The General Assembly cannot restrict the powers granted to the Governor by the Constitution.

State ex rel. v. Wright, 251 Mo. 325, 158 S. W. 823.

It has been held that the division of this State into senatorial, congressional and judicial districts is a legislative act and must be by statute, and is therefore subject to the Governor's veto.

State ex rel. Barrett v. Hitchcock, 241 Mo. 433, l. c. 457, 146 S. W. 40.

The Court said:

"That the districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority, cannot be successfully questioned. Authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain, that, too, has been the procedure with the United States Government. That authority is akin to, and flows from the same power and authority that fixes the boundary line of the State, and subdivides the State into counties, etc."

The question of the power of the General Assembly, should it undertake to act independently of the Governor, in the division of the State into congressional districts, is not before the court. The General Assembly in 1931 undertook to enact a statute in the manner provided by the Constitution of this State. It was vetoed by the Governor and returned with his objections in the time and manner required by the Constitution. The General Assembly, then, under Section 39 of Article IV of the

Constitution, could have taken a vote on the question, "Shall the bill pass, the objections of the Governor thereto notwithstanding?" But the General Assembly took no other or further action whatever on the bill. It took no other or further action in regard to the division of the State into Congressional districts, so that the question before the court is whether or not the bill passed by the General Assembly became a law. No argument or citation of authority is necessary to show that it did not become a law, and we challenge the relator to cite any decision of any court to the contrary.

Under the Constitution of Missouri the Legislature is granted sole power only in impeachments, and in such cases the House of Representatives has the sole power of impeachment and the Senate has the sole power to try the case, and in the trial of the case acts as a court and not as a legislative body.

If the action of the General Assembly of Missouri in 1931 be held to constitute a division of the State into congressional districts, the above cited provisions of the Constitution must be disregarded, and the power reserved to the people by the referendum must be held for naught.

The answer to all of the contentions of the relator is to be found in the decision of the Supreme Court of the United States in the Hildebrandt case cited above.

The Minnesota court disapproved the decision of the Supreme Court of South Dakota in the case of State ex rel. Schrader v. Polly, 28 S. D. 5, 127 N.

W. 848, but we submit that the reasoning of the South Dakota Court is more in harmony with the principles of our government.

The cases cited as to the meaning of the word "legislature" as being limited to members elected to that body when acting upon proposed amendments to the Constitution of the United States, are not applicable to the case at bar. The adoption of amendments to the Constitution of the United States is governed solely by Article V of the Federal Constitution.

The suggestion of relator that, if the action of the 1931 General Assembly be not sufficient to divide the State into congressional districts, there are now sixteen districts in Missouri from which Representatives in Congress should be elected, is wholly without merit. When the 1930 census was taken and thirteen Representatives were apportioned to Missouri, the Missouri law dividing the State into sixteen districts was not repealed but it was superceded and rendered ineffective by the exercise by Congress of the power expressly granted to it by the Constitution of the United States.

No question of the power of Congress is involved in this case, but we do not concede that the Congress has the power to divide the states into districts from and by which Representatives in Congress shall be elected or to deny admission to Representatives elected from and by the whole state.

The Constitution of the United States is a grant of power, a prohibition of power and also a reserva-

tion of power. The powers not granted to the United States by it, nor prohibited to the states, are reserved to the states or to the people.

Amendment X, Constitution of the United States.

The House of Representatives of the Congress of the United States is not composed of representatives of districts but of representatives of the several states. No power is granted to Congress to provide for representation by districts by Section 2 of Article I of the Constitution of the United States. Therefore, the power to divide the State into districts for the election of the Representatives of the State in the Congress is reserved to the State and to the people of the State by the tenth amendment to the Federal Constitution.

The power to divide the states into districts from and by which Representatives in the Congress shall be elected is not granted to the Congress by Section 4 of Article I of the Constitution of the United States. The clause, "The times, places and manner of holding elections," does not refer to the question of districts nor authorize Congress to provide for Representatives from districts as distinguished from the whole state. The State itself has the power to determine whether its Representatives in the Congress shall be elected from and by the whole State or from and by districts.

The Legislature may by law redistrict the State according to the apportionment of the Congress,

although it had previously divided the State into districts under that apportionment.

State ex rel. Fitzgerald v. Voorhis, 119 N. E. 106, 222 N. Y. 494, 168 N. Y. S. 1124, 182 App. Div. 927.

The Constitution of Missouri is the chart for the guidance of the executive, judicial and legislative branches of our government. It is a grant of power in some instances but constitutes a limitation on the power of the General Assembly.

State ex rel. v. St. Louis, 319 Mo. 497, 5 S. W. (2d) 1080;

State ex rel. v. Burton, 266 Mo. 711, 182 S. W. 746.

The State of Missouri, therefore, within the powers reserved to it and the people of the State, has determined by its Constitution how its General Assembly shall proceed in the performance of its legislative acts, and that the action of the General Assembly except as to impeachments, adjournments, joint sessions and proposals of amendments to the Constitution shall be subject to the approval or veto of the Governor.

It is conceded by all authorities that the division of a state into districts is a legislative act.

We respectfully submit that in the case at bar the respondent's action was proper, and that the alternative writ of mandamus issued herein should

be quashed, the writ of mandamus applied for denied and the respondent discharged with his costs.

Respectfully submitted,

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